NO. 20322

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES HENRY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant United States Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant United States Attorney,
Assistant Chief, Criminal Division,
ANTHONY MICHAEL GLASSMAN,
Assistant United States Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

FILED

MAR 2 1966

WM. B. LUCK, CLERK

NO. 20322

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES HENRY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

MANUEL L. REAL,
United States Attorney,
JOHN K. VAN DE KAMP,
Assistant United States Attorney,
Chief, Criminal Division,
J. BRIN SCHULMAN,
Assistant United States Attorney,
Assistant Chief, Criminal Division,
ANTHONY MICHAEL GLASSMAN,
Assistant United States Attorney,

600 U. S. Court House,
312 North Spring Street,
Los Angeles, California 90012,

Attorneys for Appellee,
United States of America.

TOPICAL INDEX

TABLE OF AUTHORITIES

Cases

Statutes

Rules

NO. 20322

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES HENRY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, James Henry, was indicted with one Aaron Jacob Fuller on September 9, 1964. The indictment was brought under 18 U.S.C., Section 659, and charged that the defendants had bought, received, and had in their possession twenty-two cartons of pressure regulators stolen from an interstate shipment. On October 12, 1964, both defendants pleaded not guilty. The case proceeded to jury trial before the Honorable Peirson M. Hall on November 3, 1964, and was concluded on November 6, 1964. The jury returned verdicts of guilty as to both defendants at 6:10 P.M., on November 6, 1964 [C.T. 7] [1], and found the value of the stolen

---

[1] "C.T." refers to Clerk's Transcript of Record

pressure regulators to be in excess of $100,000.

On November 23, 1964, co-defendant Fuller was given a five year suspended sentence. Appellant Henry made a motion for a new trial [C. T. 24] and filed an affidavit of his co-defendant Aaron Jacob Fuller in support thereof [C. T. 33, 34, 35 and 36]. The motion for new trial was denied on December 7, 1964, and appellant Henry was sentenced to three years imprisonment and fined the sum of $1,000 [C. T. 37, 38].

Appellant's Notice of Appeal was timely filed on December 7, 1964 [C. T. 40].

The jurisdiction of the District Court was based upon Title 18, United States Code, Sections 659 and 3231. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTE INVOLVED

The Indictment was brought under Title 18, United States Code, Section 659, which provides in pertinent part as follows:

> "Interstate or foreign baggage, express or freight; . . .
>
> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motor truck, or other vehicle, or from any station, station house, platform, or depot, . . . with intent to convert to his

own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or

"Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; . . .

* * * * *

"Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such . . . goods or chattels does not exceed $100.00, he shall be fined not more than $1,000 or imprisoned not more than one year, or both. . . .

"To establish the interstate or foreign commerce character of any shipment in any prosecution under this section, the waybill or other shipping document of such shipment shall be prima facie evidence of the place from which and to which such shipment was made."

III

STATEMENT OF THE CASE

Appellee does not restate here the five titles of argument utilized by appellant at pages 13-25 of appellant's brief. [2/] Appellee's brief does, however, deal with each point therein stated, citing under the several argument headings whatever testimonial or procedural references are deemed necessary by appellee for the determination of each such issue.

The procedural aspects of the case are otherwise set out herein in appellee's Jurisdictional Statement, supra.

IV

STATEMENT OF FACTS

On August 3, 1964, a truck belonging to the Transport Cartage and Distributing Company of Los Angeles was stolen from its parking lot [R. T. 23]. [3/] The truck was loaded with various items of freight being transported in interstate commerce [R. T. 32, 33]. Included among the freight were twenty-two cartons of pressure regulators which had been consigned by Fisher Governor Company, Marshaltown, Iowa, to Meeder Equipment Company, Alhambra, California.

[2/] We note in this regard that appellant's brief fails to contain a specification of errors or to "set out separately and particularly each error intended to be urged" as is required by Rule 18, subd. 2(d) of The Rules of this Court.

[3/] "R. T." refers to Reporter's Transcript of Proceedings.

The truck was subsequently located and was returned to the Transport Cartage Freight house by the onwers' employees on August 4, 1964. However, at this time it was only two-thirds loaded [R. T. 26]. Among the missing items were the twenty-two cartons of pressure regulators [R. T. 35]. Also missing were Thirteen cartons of auto parts and other items of freight [R. T. 36].

Some time during the first week of August, 1964, in Los Angeles, California, the missing twenty-two cartons of pressure regulators and the rest of the stolen freight were purchased by one John Persley from two unidentified men [R. T. 41]. Persley paid a total of $300 for all of the merchandise he purchased [R. T. 41]. After purchasing the stolen items Persley stored them in his garage [R. T. 41]. At the time of the purchase Persley knew that the pressure regulators were stolen [R. T. 68]. (Persley subsequently pleaded guilty to receiving the stolen pressure regulators which were the subjects of the indictment against appellant Henry and his co-defendant Fuller [R. T. 71]).

After storing the stolen merchandise in his garage Persley talked to appellant Henry about buying the stolen pressure regulators. This initial conversation took place at appellant Henry's used car lot in San Pedro [R. T. 43]. Henry then came to Persley's home and looked at the stolen merchandise stored in the garage [R. T. 43]. Henry took a couple of the pressure regulators as samples to see if he could dispose of them and told Persley "I'll check them and see you later" [R. T. 43, 44].

The next day, Friday, Henry told Persley that something

could be done with the pressure regulators [R. T. 44]. In fact, appellant Henry had arranged to resell the pressure regulators to Industrial Products Co. [R. T. 299].[4/] Appellant Henry then made arrangements to pick up the stolen pressure regulators the following Monday [R. T. 45]. The agreed purchase price of the regulators between Persley and Henry was to be $110 [R. T. 50].

The following Monday, at appellant Henry's car lot, appellant told Persley that he (Henry) could "move" the pressure regulators. Persley and co-defendant Fuller then went to Persley's garage, in appellant Henry's station wagon, where they loaded the stolen pressure regulators into the station wagon and transferred them from Persley's garage to appellant Henry's used car lot [R. T. 45, 47].

At the time the stolen regulators were taken to appellant Henry's used car lot they were still in their original containers [R. T. 49]. Persley testified that when Henry saw the regulators in their original containers he stated that they couldn't be moved in those containers [R. T. 49]. Appellant Henry requested Persley to get some new cartons for the regulators at the ABC Market in San Pedro. Persley did so [R. T. 50]. When these regulators were subsequently sold by appellant Henry to the Industrial Products Co., they were not in the original shipping cartons but were packed in food cartons [R. T. 148].

Persley testified that at no time did he tell appellant Henry

---

[4/] Sometimes also referred to in the transcript as Industrial Production Supply or Industrial Supply.

that he had found the regulators at a dump [R. T. 62]. On cross-examination Persley stated that he told Henry that "Two fellows brought me a truck. They came in a truck. I have a truckload of stuff and I want to get rid of it." [R. T. 88]. Persley never received a bill of sale from the two men from whom he received the regulators and he never gave a bill of sale to appellant Henry after completing the sale to him for $110 [R. T. 94].

Quite naturally Persley never specifically articulated to appellant Henry that the pressure regulators were stolen [R. T. 68]. As Persley testified on re-direct examination:

> "Q. They didn't tell you it was stolen, did they?
>
> "A. No. This was not something that you discuss if a fellow came to you with a truck. He just brings it, it's just something you've got."
>
> [R. T. 94].

Before completing the purchase of the pressure regulators from Persley appellant Henry had arranged for the sale of these 250 pressure regulators to Industrial Products Company of Alhambra [R. T. 118]. The sale price was $184. Appellant Henry arranged to have the regulators delivered to William Jones of the Industrial Products Company [R. T. 116]. Jones attempted to deliver, upon a resale, the 250 regulators to the Meeder Company [R. T. 116]. The Meeder Equipment Company, however, had been looking out for the stolen merchandise and had merely played along with the proposed sale. As soon as they had been approached regarding the

sale of the 250 regulators they had notified the F. B. I. [R. T. 145].

The 250 pressure regulators delivered to the Meeder Equipment Company were the same regulators that the Meeder Company had ordered from the Fisher Governor Company August of 1964 [R. T. 132], and which had been stolen from the parking lot of Transport Cartage and Delivery Company.

V

SUMMARY OF ARGUMENT

A. The Evidence Taken as a Whole Supports the Verdict of the Jury.

  1. The Government Proved Beyond a Reasonable Doubt That Appellant Henry Received Possession of the Pressure Regulators Knowing the Same to Have Been Stolen.

  2. The Statements Made by Co-Defendant Fuller to Agent Loughney Were Properly Admitted.

B. The Trial Court Did Not Commit Error in Permitting Evidence of Other Alleged Offenses.

C. The Trial Judge Did Not Coerce the Verdict.

D. Appellant's Motion for a New Trial was Properly Denied.

E. There Was No Error or Prejudice to Appellant as a Result of Government Counsel's Argument Concerning the Statement Made by Co-Defendant Fuller to F. B. I. Agent Loughney.

VI

ARGUMENT

A. THE EVIDENCE TAKEN AS A WHOLE SUPPORTS THE VERDICT OF THE JURY.

1. The Government Proved Beyond a Reasonable Doubt That Appellant Henry Received Possession of the Pressure Regulators Knowing the Same to Have Been Stolen.

That a defendant may be convicted upon only the uncorroborated testimony of an accomplice cannot be questioned.

Proffit v. United States, 316 F. 2d 205 (9th Cir. 1963);
Gulley v. United States, 319 F. 2d 77, 80 (6th Cir. 1963), cert. denied 375 U.S. 942;
United States v. Marpes, 198 F. 2d 186 (3d Cir. 1952).

The credibility of the accomplice is, of course, a question for the jury.

United States v. Marpes, supra.

Thus the testimony of the accomplice, Persley, could have been sufficient, in and of itself to have convicted appellant Henry if believed by the jury beyond a reasonable doubt.

Knowledge of the stolen character of the pressure regulators involved may be established by circumstantial evidence.

United States v. Spatuzza, 331 F. 2d 214 (7th Cir. 1964);
United States v. Allegrucci, 258 F. 2d 70 (3d Cir. 1958).

There was considerable evidence adduced from which the

jury could conclude that appellant Henry must have had knowledge that the pressure regulators he purchased from Persley were stolen. We note by way of example the following:

(a) That Persley knew that the pressure regulators were stolen and never tried to conceal that fact from the appellant [R. T. 68].

(b) That appellant Henry told Persley that they couldn't be moved in their original containers [R. T. 49], and told Persley to get new ones.

(c) That appellant Henry had arranged to resell the regulators prior to his receipt of the regulators from Persley [R. T. 299].

(d) That appellant Henry received no bill of sale for the regulators [R. T. 210], nor for that matter did Persley who admitted that he knew from the circumstances that they were stolen.

(e) That the regulators had a value of at least $600 [R. T. 138] and were purchased by appellant for considerably less and resold by appellant for an amount still far less than their market value, once the markings of ownership had been removed.

(f) That co-defendant Fuller and Persley went to Persley's garage to pick up the stolen pressure regulators in Henry's station wagon.

(g) That appellant Henry stated that he could move the goods.

In Melson v. United States, 207 F. 2d 558, 559 (4th Cir. 1953), the defendant was indicted for having in his possession 400 cases of

eggs. The defendant admitted helping sell the eggs but denied knowing that they were stolen. The Fourth Circuit held that:

> "It is obvious that these circumstances, particularly the low price at which the eggs were sold by the defendant and his associate, and the obliteration of marks of ownership from the cartons, were such as to justify the inference that the defendant had knowledge that the goods had been stolen."

Appellant Henry never denied that the pressure regulators were placed in different cartons at his direction. While Persley could not recall the exact markings on the original containers he could recall that there were addresses on them and that the addresses were somewhere in Alhambra, California [R. T. 49]. The original consignee of the pressure regulators, Meeder Equipment Company is located at 2007-11 West Mission Road, Alhambra, California. It seems clear that there could have been only one reason for appellant Henry to direct Persley to place the regulators in new cartons; that reason being that he wanted to remove the name of the legal consignee of the merchandise.

At the time that Henry inspected the pressure regulators the name of the original consignee was marked on the carton [R. T. 49]. If appellant Henry had really not known that the regulators were stolen wouldn't he have at least inquired into the identity of the consignee? And if he never noticed that the cartons had the name of the original consignee affixed to them why then did he tell Persley that the goods couldn't be moved in the cartons

they were in? Appellant, although having testified on his own behalf, offered no explanation to cover the obvious reason for changing the cartons.

The evidence that appellant Henry received no bill of sale from Persley is indicative of Henry's guilty knowledge. Appellant Henry had already arranged to resell the regulators to Industrial Products prior to the time that he accepted the regulators from Persley. He knew they were not junk and he knew what value they had. The fact that no bill of sale was received was in keeping with the entire transaction. Nothing had to be articulated regarding the stolen character of the regulators. In transactions of this nature nothing overt need be said; everything is understood [R. T. 94].

Finally, it is accepted law that if an individual is found to be in possession of recently stolen property, this is a circumstance from which a jury may infer that the person in possession knew that the property had been stolen.

> Ballenbach v. United States, 326 U. S. 607, 616 (1946);
>
> McNamara v. Henkel, 226 U. S. 520, 524-525 (1913);
>
> United States v. Allegrucci, 258 F. 2d 70 (3d Cir. 1958);
>
> Morrandy v. United States, 170 F. 2d 5, 6 (9th Cir. 1948).

2. The Statements Made By Co-Defendant Fuller Were Properly Admitted.

Appellant states in his brief at page 19, that "nor were the statements of Fuller, an accomplice, received with caution or weighed with great care by the jury". This is mere conjecture by appellant. He cannot possibly know how the jury received or weighed the statements made by Fuller, and it must be presumed that the jury followed the specific instructions of the Court.

When Agent Loughney testified as to the conversation he had with co-defendant Fuller, counsel for appellant Henry objected to any of these statements being admitted against Henry [R. T. 156]. The Court at that time instructed the jury:

> "Any testimony concerning any statements made by the defendant Fuller out of the presence of the defendant Henry may be considered by you only in connection with the defendant Fuller."
>
> [R. T. 156].

Thus the statements made by Fuller were admitted only for the limited purpose of being considered against Fuller and not as against appellant Henry.

Later on during Agent Loughney's testimony, he testified as to another conversation he had had with Fuller. At this time there was no objection by counsel for appellant Henry [R. T. 163]. It seems clear that counsel understood that the jury had already been properly advised, just a few minutes earlier, that any

statements made by Fuller were only to be admitted in connection with the defendant Fuller.

B. THE TRIAL COURT DID NOT COMMIT ERROR IN PERMITTING EVIDENCE OF OTHER ALLEGED OFFENSES.

The trial court did not err in permitting into evidence testimony that the interstate shipment in question contained shifters, carpeting, chemicals and some skylights in addition to the subject regulators [R. T. 40]. The evidence was introduced only for the limited purposes of showing what was in the stolen shipment and to show intent and guilty knowledge. In Degnan v. United States, 271 Fed. 291 (2d Cir. 1941), it was held that evidence that the defendant had been handling other items, also proved to have been stolen from the same shipment at the same place and time, was admissible to show the intent and guilty knowledge of the defendant.

The Government only introduced evidence that appellant Henry knew what other stolen merchandise Persley had in his garage for the purpose of showing appellant Henry's intent and to show the extent of Henry's knowledge of the nature of Persley's business.

> See Sachs v. United States, 281 F. 2d 189, 191 (9th Cir. 1960), cert. denied 81 S. Ct. 272, 364 U.S. 909.

In United States v. Williams, 194 F. 2d 72, 77 (7th Cir. 1952), the District Court permitted evidence as to what other items had

had been stolen from an interstate shipment. None of these items were the subject of the indictment against the defendant. The Seventh Circuit held that:

> "Showing the theft of the other crates, cartons, and the pick-up truck would tend to show that the ice cube maker had also been stolen and when it had been stolen. The evidence was proper for this purpose."

The fact that appellant Henry viewed this other stolen merchandise in Persley's garage is probative evidence going to his criminal intent and guilty knowledge. It should have been obvious to appellant Henry that Persley, an unemployed truck driver, would not have had so much varied merchandise in his garage in original cartons unless such had been obtained in an unlawful manner.

The evidence regarding co-defendant Fuller's other similar criminal activities was admitted only for the purpose of showing co-defendant Fuller's criminal intent. The jury was instructed that the evidence was only to be considered in connection with the defendant Fuller and not against appellant Henry [R. T. 156]. These criminal activities by Fuller (receipt and possession of goods stolen from an interstate shipment) were not part of Fuller's "past life" of crime but were contemporaneous with and identical to the charge in the indictment and as such were admissible against the defendant Fuller.

C. THE TRIAL JUDGE DID NOT COERCE THE VERDICT.

The jury retired to begin their deliberations on Friday afternoon at 2:10 p. m. At 5:00 p. m., the jury was called back into the courtroom and the foreman informed the judge that they had not yet been able to arrive at a verdict [R. T. 292]. At this point the trial judge stated to the jury:

> ". . . The case has taken the better part of three days to try, it has cost the Government and the defendants some considerable money, if you can arrive at a verdict you should do so. . . "

The judge further told the jurors that he did not suspect that any new jury would be any more intelligent than they were and that they should try and arrive at a verdict in the next 30 minutes.

At 5:40 p. m., the jury returned and inquired whether or not appellant Henry had made arrangements with Industrial Products prior to buying the goods from Persley [R. T. 297]. It was stipulated by all parties that appellant Henry had contacted Industrial Products before he purchased the goods from Persley. Upon questioning by the court the foreman then advised the court that he thought the jury would be able to arrive at a verdict. The jury then retired from the courtroom at 5:55 p. m. At 6:10 p. m., the jury returned verdicts of guilty against appellant and his co-defendant Fuller.

This type of supplemental instruction has been approved by

the United States Supreme Court in Allen v. United States, 164 U. S. 492, 501-502 (1896). The Ninth Circuit has also approved a similar charge by the trial judge. Kawakita v. United States, 190 F. 2d 506 (9th Cir. 1951), aff'd 343 U. S. 717, reh. denied 344 U. S. 850. This Court, in the Kawakita case, stated that "It is far more likely that the earnest and thorough talk to the jury by the judge impressed the members with their duties to eliminate personal conflict of temperament and weigh the evidence in the cold scale of impersonal logic." This would appear to be precisely the effect that the trial judge's charge had on the jury. Within thirty-five minutes after receiving the charge they had returned to the courtroom with apparently only one question left unresolved. Upon the resolution of that question they almost immediately arrived at their verdict. There was no coercion involved. Only an appeal to logic and reason, with no direction by the court to other than earnestly deliberate the facts of the case.

D. APPELLANT'S MOTION FOR A NEW TRIAL WAS PROPERLY DENIED.

The grounds for a motion for a new trial are set forth in Rule 33, Federal Rules of Criminal Procedure. One of these grounds include newly discovered evidence. It is clear that from the date of filing of appellant Henry's motion for new trial, November 18, 1964, and as enlarged upon in his second such motion filed on December 2, 1964, that as more than 5 days had passed from

the date of jury verdict, November 6, 1964, the motions could only be treated as based upon alleged "newly discovered evidence" [R. T. 312]. Rule 33, supra. The grounds alleged by appellant, in attack upon the jury's verdict were not, however, proper grounds for such a motion for new trial under Rule 33.

Co-defendant Fuller's affidavit, attached to appellant Henry's motion for a new trial did not contain reference to facts which were unknown to Henry at the time of trial and did not constitute newly discovered evidence within the meaning of Rule 33, Federal Rules of Criminal Procedure.

Defendant Fuller, himself a convicted felon, after having been granted probation by the District Court, then presented a detailed story of the alleged background of his possession of the pressure regulators. He attempted to join appellant Henry's other alibi witnesses in disputing accomplice Persley's trial testimony. He added nothing new as to Henry's role in receiving and re-selling the regulators which was not presented by other witnesses to the jury. He merely tried to impeach Persley by his declaration. It should be noted that Fuller's declaration is contrary to what he had told Agent Loughney of the F. B. I. He spoke falsely then, or in the affidavit, or both.

The Ninth Circuit in reviewing a similar situation, where a friend's affidavit contained alleged "newly discovered evidence" said in Perez v. United States, 297 F. 2d 648 (9th Cir. 1961):

> "The proposed new evidence was an attempt to impeach the identifying witness, Lira. It all 'existed'

prior to the trial. There was nothing of due diligence in seeking it. Prila v. United States, 279 F. 2d 407, 408 (9th Cir. 1960); Pitts v. United States, 263 F. 2d 808 (9th Cir. 1959), cert. denied 360 U. S. 919, . . . "

In Prila v. United States, supra, the Ninth Circuit held:

> "A motion for a new trial based on the ground of newly discovered evidence has to meet the following requirements: (1) It must appear from the motion that the evidence relied on is, in fact, newly discovered after the trial; (2) the motion must allege facts from which the court may infer diligence on the part of the movant; (3) the evidence relied on must not be merely cumulative or impeaching; (4) must be material to the issues involved; and (5) must be such as, on a new trial, would probably produce an acquittal."

The motion for new trial was properly denied.

E. THERE WAS NO ERROR OR PREJUDICE TO APPELLANT AS A RESULT OF GOVERNMENT COUNSEL'S ARGUMENT CONCERNING THE STATEMENT MADE BY CO-DEFENDANT FULLER TO F. B. I. AGENT LOUGHNEY.

Government counsel's reference to the statement made by co-defendant Fuller to Agent Loughney was only through inadvertence and was not calculated to prejudice the appellant Henry. The conversation in question had already been restricted as evidence solely against co-defendant Fuller [R. T. 156].

When counsel for appellant objected to Government counsel's argument the court instructed the jury again in reference to that conversation that "It was not admitted against Mr. Henry, it was admitted against Mr. Fuller only" [R. T. 263]. Following this Government counsel stated "I will retract that phase of the argument, Your Honor." [R. T. 263]. Certainly an inadvertent comment such as this, when followed by a proper admonishment by the trial judge could not have been so prejudicial as to have been the cause of appellant's conviction.

Orebo v. United States,
293 F. 2d 749 (9th Cir. 1961).

VII

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of conviction of appellant Henry should be affirmed.

Respectfully submitted,

MANUEL L. REAL,
United States Attorney,

JOHN K. VAN DE KAMP,
Assistant United States Attorney,
Chief, Criminal Division,

J. BRIN SCHULMAN,
Assistant United States Attorney,
Assistant Chief, Criminal Division,

ANTHONY MICHAEL GLASSMAN,
Assistant United States Attorney,

Attorneys for Appellee,
United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Anthony Michael Glassman

ANTHONY MICHAEL GLASSMAN